No. 12,514

IN THE

United States Court of Appeals

For the Ninth Circuit

ORESTUS CAVNESS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

FONG, MIHO AND CHOY,
Suite 202 Alakea Building,
Alakea and King Streets, Honolulu 13, T. H.,
Attorneys for Appellant.

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STATEMENT OF JURISDICTION.

On the 15th day of September, 1949, the Grand Jury of the United States District Court for the District of Hawaii returned an indictment against the Appellant charging him with having purchased cocaine in the City and County of Honolulu, (Tr. 2, 3) Territory of Hawaii without the necessary Internal Revenue Stamps, contrary to the provisions of Section 2553(a), Title 26, U. S. Code, to-wit:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a) except in the original stamped package; and the absence of

> appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

The Appellant entered a plea of not guilty, a jury was selected and the trial was commenced on December 5, 1949. (Tr. 45) The Appellant filed in Open Court on December 5, 1949, a Motion for Suppression of Evidence (Tr. 8, 9) based on the ground that certain evidence was seized unlawfully. After a hearing the Court denied said motion, but an exception to this ruling was noted. (Tr. 264-268) In due time the jury rendered a verdict of "guilty as charged". (Tr. 534) The Appellant duly noted an exception to the verdict as being contrary to the law and weight of the evidence. (Tr. 536) Before judgment and sentence were entered, the Appellant filed a Renewal of Motion for Judgment of Acquittal and an Alternative Motion for New Trial and after a hearing on both these motions the Court denied them but permitted exceptions on each and every ground set forth in these motions. (Tr. 613-616) Judgment and sentence were then entered. (Tr. 31-34, 616)

The United States District Court for the District of Hawaii, by virtue of Section 41(2), Title 28. U. S. Code as amended, had original jurisdiction of this

cause by reason of the fact that the Appellant was charged with the commission of a crime or offense cognizable under the authority of the United States.

On January 9, 1950, the Appellant filed a Notice of Appeal (Tr. 35) and with it the necessary bond. (Tr. 37)

The United States Court of Appeals for the Ninth Circuit, by virtue of Section 1291 of Chapter 83 Courts of Appeals, Title 28, U. S. Code, as amended, has jurisdiction to review this matter on appeal from the final decision of the United States District Court for Hawaii.

STATEMENT OF THE CASE.

The Appellant was charged by the Grand Jury in the District Court of the United States, for the District of Hawaii, with having purchased cocaine in the City and County of Honolulu, Territory of Hawaii, without the necessary Internal Revenue Stamps, contrary to the provisions of Section 2553(a), Title 26, U.S.C. (Tr. 2) To this indictment the Appellant entered a plea of not guilty.

On December 5, 1949, a jury was sworn and impanelled. On that day the Appellant filed a Motion for Suppression of evidence (Tr. 8) alleging that certain properties were unlawfully seized and requested that these properties be suppressed as evidence against him in any criminal proceedings. After a hearing the Court denied this Motion, but permitted an exception to its ruling. (Tr. 264-268)

During the hearing one of the witnesses made a statement (Tr. 402) which the Appellant believed was prejudicial to him and as a result moved for a mistrial. (Tr. 431) The Court denied this motion and an exception was taken. (Tr. 431-432)

After several days of hearing the jury returned a verdict of "guilty as charged". (Tr. 534-535) The Appellant then filed a Renewal of Motion of Judgment of Acquittal (Tr. 24) and an Alternative Motion for a New Trial. (Tr. 25) Argument was heard on the points listed in said motions after which the trial Court ruled that the Motions were without merit and therefore denied them but permitted exceptions on the basis of each ground thereof. (Tr. 613-616)

Judgment and sentence (Tr. 31-34, 616) were entered after which the Appellant filed a Notice of Appeal. (Tr. 35-36)

SPECIFICATIONS OF ERROR.

1. The trial Court erred in denying the Appellant's motion for the suppression of evidence.

2. The trial Court erred in denying the Appellant's motion for a new trial, which was argued on December 13, 1949.

3. The trial Court erred in denying the Appellant's motion for judgment of acquittal.

4. The trial Court erred in denying the Appellant's alternative motion for a new trial.

ARGUMENT.

ASSIGNMENT OF ERROR NO. 1.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR THE SUPPRESSION OF EVIDENCE.

A. The search warrant issued in the instant case was invalid in that the affidavit upon which it was based was incorrect.

Mere clerical errors in an affidavit failing to state the correct date will not vitiate the search warrant based thereon. *Pera v. U. S.* (CCA 9th Cir.), 11 F. (2d) 772, 773. However, the date of July 10, 1949 on the said search warrant and Miss Wilson's affidavit was not a mere clerical error, but a gross error in that no purchase of one (1) capsule of cocaine was made on said date. To justify an issuance of a search warrant, it is essential that the exact date on which the alleged offense was committed be stated in the affidavit in order that the Court may determine whether probable cause exists for the issuance of warrant. *Welchance v. State,* 114 SW (2d) 781, 173 Tenn. 26.

It is, therefore, submitted that the search warrant issued in the instant case is invalid in that the date of said purchase of one (1) capsule of cocaine on the search warrant (Tr. 5-7) and affidavit (Tr. 3-5) of Gerry Wilson, the government's informer, were incorrect. On July 10, 1949, Miss Wilson stated that she visited the premises described in the search warrant (Tr. 5-7) and purchased on said day one (1) capsule of cocaine; whereas, on said date, the evidence shows she did not make such a purchase. (Tr. 190-193)

B. There was no legal arrest of appellant.

It is generally accepted that an officer attempting to make an arrest should make known his purpose and the official capacity in which he is acting and the cause of the arrest. Officer W. K. Wells did make known to Appellant his purpose and official capacity but only informed Appellant that he had a warrant to search the premises. (Tr. 52) At no time did Mr. Wells make known to Appellant that he was to be arrested. Also, it was not until Appellant was subdued, handcuffed, and brought into said described premises was the search warrant served upon him. (Tr. 54) In view of the foregoing facts, it is submitted that Appellant was never lawfully arrested.

C. In the arrest of a person without a warrant, the burden of proof is with the person arresting or causing the arrest, to show that the arrest was lawful.

In *Nelson v. U. S.*, (CCA, 8th Cir.), 18 F. (2d) 522, 528, the Court held:

> "In the arrest of a person without a warrant, the burden of proof is with the person arresting or causing the arrest, to show that the arrest was lawful. 5 C. J. pp. 396, 408."

It is submitted that the Government failed to sustain its burden of showing that the arrest of Appellant, prior to the time he was subdued, was lawful. Prior to the struggle, Officer Wells informed Appellant that he had a warrant to search his home. (Tr. 52) The only time Appellant was purportedly arrested was after he was subdued, the search warrant

was served upon him, and when certain evidence was found in Appellant's yard by Officer Abbey. (Tr. 121)

There is no doubt that an officer may arrest another without a warrant of arrest if there was probable cause to justify the arrest; but an officer cannot act upon mere suspicion.

> "An officer acting without a warrant for an arrest and without attempting to make an arrest is not justified in making a search of a person upon mere suspicion that he has committed a crime."
>
> 4 *American Jurisprudence* 48.

The proper test in making an arrest is whether there was:

> "probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof?" *Garske v. U. S.,* (CCA, 8th Circuit), 1 F. (2d) 620, 625.
>
> "If a seizure is based on mere suspicion, and the facts do not justify an arrest, the subsequent discovery by an examination of the evidence secured by the seizure that the suspicion was well founded is not sufficient to make what was unlawful at its commencement a lawful search." *Garske v. U. S.,* 1 F. (2d) p. 625, supra.

In the instant case, the testimony of Officer Wells shows that he acted merely upon suspicion when he saw a Vicks inhaler tube in Appellant's right hand (Tr. 119-120) and that upon this suspicion alone he tried to obtain said Vicks inhaler tube by force. (Tr. 120) In addition, Officer Wells testified that it is

purely guesswork to tell the nature of a drug merely by looking at it and without chemical analysis. (Tr. 77-78)

It is therefore submitted that there was no lawful arrest of Appellant because Officer Wells did not act upon probable cause, but merely upon suspicion.

D. U. S. Exhibits Nos. 1 (Tr. 270), 2A (Tr. 347), 2B (Tr. 349), and 3 (Tr. 367-368), are inadmissible because they were obtained by an unlawful arrest and a forcible search upon appellant without a warrant of arrest, or probable cause, or a search warrant of appellant's body.

It is submitted that evidence obtained by an unlawful arrest, or by a forcible search upon another without a warrant of arrest, and without probable cause, or without a search warrant of a person are inadmissible as evidence against an accused.

In *Brown v. U. S.*, (CCA, 9th Circuit), 4 F. (2d) 246-247, the Appellant, after parking his car, removed a package from the back part of his car and started up the street. The package was not smooth and from its appearance might have contained bottles. An officer then placed Appellant under arrest. The officer, prior to that time, had been informed that the Appellant was a bootlegger, and was given the license number of his car, but the source of his information was not disclosed. Beyond these facts, the officer had no knowledge of any kind, and no information from any source that a crime was being committed in his presence and he testified that he had acted on suspicion only. The Court held:

(1) "While an officer may arrest without a warrant for a reasonable cause, *he can act only upon evidence,* he cannot act upon mere suspicion." (Italics ours)

(2) "Arrest was without authority of law, and the property wrongfully seized was not admissible in evidence."

In *Snyder v. U. S.,* (CCA, 4th Circuit), 285 F. 1, 2, Appellant, standing in a public street, was approached by Federal probation officer. Observing the inside of Appellant's overcoat bulging out and the neck of a bottle protruding, the officer placed his hand on Appellant's shoulder, "beat him up", took the bottle and placed him under arrest. The officer admitted that he did not know the nature of the contents of the bottle until he had forcibly taken the same from Appellant's pocket. The whiskey was subsequently admitted as evidence in the trial Court.

The Court held:

(1) "That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been frequently decided as not to require citation of authority."

(2) "It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest."

(3) "If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck which he could see protruding from the pocket

of Appellant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without having first secured a warrant, were illegal, and *the only justification was his suspicion is admitted by the evidence of the arresting officer himself.*" (Italics ours)

(4) "*The Federal Courts have heretofore adopted the policy of excluding evidence illegally obtained by a Federal officer,* whether the evidence so obtained was by unlawful invasion of his home or of his person, on the ground that to hold otherwise would be to require him to supply evidence against himself." (Italics ours)

In *Hernandez v. U. S.,* (CCA, 9th Circuit), 17 F. (2d) 373, the appellant was seen coming from a house wherein narcotics were suspected of having been sold, in the company of a woman suspected of being a narcotics dealer, and, as both of them were walking down the street, they looked around in what the officer thought was "a rather suspicious way". Both were arrested and searched and the appellant found to have narcotics in his pocket. The Court there correctly held that such circumstances did not justify an arrest and search without a warrant, but at the most constituted mere suspicion, and that the evidence obtained were inadmissible, saying:

(1) "Probable cause for an arrest has been defined to be a reasonable ground for suspicion, supported by *circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty*". (Italics ours)

(2) "At most, the circumstances were suffi-
defined to be a reasonable ground of suspicion, *circumstances, it has been repeatedly held, do not constitute probable cause.* It is true that the Appellant was arrested in the commission of a felony, as was *subsequently developed,* but the officers were not apprised of that fact by their senses or otherwise, and they had no reasonable grounds to believe it." (Italics ours)

In *U. S. v. Clark,* 29 F. Supp. 138, 139, 140, a Federal narcotics agent, who had observed defendant drive in to a station, approached the automobile in which she was seated, placed her under arrest, although he had no warrant of arrest, searched defendant's person although he had no search warrant, and found concealed in her clothing several grains of heroin not in the original stamped package, which he seized. Immediately, before the arrest, the defendant's companion, who was an informer known to the agent and officers with him to be reliable, indicated to the agent by signal in accordance with a prearranged code that the defendant actually had narcotics in her possession. The Court, in passing upon the motion to suppress the evidence, stated:

"The question is: Is the positive statement by a citizen of good reputation to an officer that another citizen has committed a felony, a reasonable ground which will justify an arrest without a warrant?"

Answering its own question, the Court made the following holding:

"It seems to us that the Fourth Amendment to the Constitution, United States of America, is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guesswork and speculation."

"Learned counsel for the Government suggests that even if the arrest of the defendant was unlawful, still the search of the defendant's person was lawful. We are unable to agree, 1. The forcible seizure and search of another's person is an arrest. 2. To justify either the arrest or the search, the officer must have had reasonable grounds to believe that a felony has been committed by the Defendant. In this case, such grounds have not been shown".

In the instant case U. S. Exhibit No. 1 (Tr. 269, 270), four pieces of shattered Vicks inhaler tube picked up by Officer Shaffer in the area where the struggle took place (Tr. 244) were inadmissible as evidence against Appellant being acquired by force incident to an unlawful arrest and seizure of Appellant's person.

Similarly, U. S. Exhibit No. 2A (Tr. 346-348), six capsules containing white substance picked up by Officer Shaffer in the area where the struggle took place (Tr. 203, 209, 256) were inadmissible as evidence against Appellant having been acquired by force

incident to an unlawful arrest and seizure of Appellant's person.

Similarly U. S. Exhibit No. 2B (Tr. 348), top of a Vicks inhaler tube and the two capsules adhering to it picked up by Officer Abbey were inadmissible as evidence against Appellant having been acquired by force incident to an unlawful arrest and seizure of Appellant's person. In this instance, Officer Abbey testified that Agent Wells directed him to use the blackjack to open Appellant's left hand. (Tr. 285, 321, 322) At that time, Officer Abbey noticed a small object falling from Appellant's hand, and after Appellant was subdued, Officer Abbey went back to the place of struggle and found the top of the inhaler tube with the two capsules adhered to it. (Tr. 285)

And U. S. Exhibit No. 3 (Tr. 367-368), a broken piece of a Vicks inhaler tube picked up by Officer H. Whitford out of Appellant's right hand (Tr. 363) after Officer Abbey had hit Appellant's hand with a blackjack (Tr. 363) was inadmissible as evidence against Appellant having been acquired by force incident to an unlawful arrest and seizure of Appellant's person.

ASSIGNMENT OF ERROR NO. 2.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL.

It is submitted that the lower Court erred in denying Appellant's Motion for a Mistrial (Tr. 431, 432) on the testimony of Officer Souza, who said that at

the time of struggle, Appellant appeared to be "hopped up". (Tr. 402) Although the Court instructed the jury to disregard the remark (Tr. 403), it undoubtedly was indelibly impressed in the minds of the jurors, making a fair and impartial trial impossible.

In *Moore v. U. S.*, 150 U. S. 57, 60, 37 L. Ed. 996, 14 S. Ct. 26, the Court said that:

> "Where the question relates to the tendency of certain testimony to throw light upon a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, *unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.*" (Italics ours)

In *Beck v. Wings Field, Inc.*, (CCA, 3rd Circuit), 122 F (2d) 114, 116, 117 the Court held:

> "A wide range of discretion rests with the trial Court in the granting or refusing of a new trial. See Federal Rules of Civil Procedure, Rule 61, 28 U.S.C.A. following Section 723(c). In fact, it is only for an abuse of discretion in refusing a new trial that an appellate court will reverse."
>
> "Here we have a case of a gratuitous remark by a witness for the Plaintiff which not only Defendant's counsel said was improper, but which the trial court told the jury was 'highly improper', and which counsel for the Plaintiff admits was improper. What, then, was the degree

of its impropriety? *Could its undeniably harmful effect be obliterated by the Court's admonition to the jury, or was it such that, in the contemplation of the law, the trial could no longer be proceeded with fairness and impartiality to the Defendant?* The question, therefore, with which we have to deal is whether the prejudicial and harmful effect of the volunteered remark could possibly be eradicated from the jury's thinking while deliberating upon the case. If it could, then no harm was done and the trial court's refusal to withdraw a juror was not error." (Italics ours).

"The effect of improper matter necessarily varies according to 'the atmosphere of the trial'."

"It will be conceded that, *ordinarily, prejudicial remarks of counsel call for the direction of a mistrial.* And it has been said that it is quite as necessary to protect a party against the improper remarks to a jury made by a witness as it is against such remarks when uttered by counsel. In either case, it is inexcusable, and the only protection the injured party has must come from the court, and it should act promptly in the matter. *Surface v. Bentz,* 228 Pa. 610, 613, 77 A. 922, 923, 21 Ann. Cas. 215." (Italics ours)

In view of the foregoing cases, it is submitted that Appellant is entitled to a mistrial because the remark by Officer Souza was indelibly impressed in the minds of the jurors, making a fair and impartial trial impossible.

ASSIGNMENT OF ERROR NO. 3.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. The United States failed to prove that the capsules and parts thereof, which contained cocaine were not in the original stamped package, did not have stamp tax on them, and did not come from the original stamped package.

Nowhere in the testimonies of the government witnesses or in U. S. Exhibits Nos. 1, 2A, 2B, and 3 in evidence was there any showing that the alleged capsules of cocaine were not in the original stamped package, did not have the appropriate tax paid stamps on them, and did not come from the original stamped package.

It is a necessary element of the crime charged that the cocaine was purchased without the necessary Internal Revenue Stamps. This cannot be assumed. It must be proved.

It is submitted that the U. S. failed to prove that the capsules and parts thereof were not in the original stamped package, did not have stamp tax on them, and did not come from the original package.

ASSIGNMENT OF ERROR NO. 4.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S ALTERNATIVE MOTION FOR A NEW TRIAL.

A. The appellant was denied a fair trial because Mr. Samuel A. Parish, one of the jurors, was at the time of the trial a reserve police officer in the Honolulu Police Department.

In *U. S. v. Lampkin,* 66 F. Supp. 821, 824, the Court held that:

> "It may fairly be said to be the rule that *a juror owes the duty to the Court and to those who are interested in the case* being tried where he is being examined touching his qualifications to serve as a juror, to answer truthfully, fully and fairly all questions asked upon the examination to determine his qualifications to serve as a fair and impartial juror, to the end that challenges may be intelligently exercised and unsuitable persons may be excused from serving as jurors in the case. *The juror should of course, whether specifically questioned or not, disclose any natural information which might bear upon his qualifications. . . .*" (Italics ours)

It is submitted that Appellant was denied a fair trial because Mr. Samuel A. Parish, one of the jurors, was at the time of the trial a Reserve Police Officer in the Honolulu Police Department. When a question was asked during the selection of the jury whether any member of the jury was or ever had been a member of the Reserve Officers of the Honolulu Police Department, Mr. Parish failed to respond thereto. (Tr. 538-540) Mr. Samuel A. Parish's sitting on the jury prejudiced Appellant to the extent that he was denied a trial by an impartial jury. In the absence of an impartial jury, Appellant was denied a fair trial.

B. The appellant was denied a fair trial by reason of the fact that Mr. Herbert A. Clark, one of the jurors, after the jury had been instructed to consider the verdict, did leave the confines of the jury room without permission of the Court and did make one or more phone calls.

These acts of Mr. H. A. Clark were in violation of his duties as a juror because said phone calls were

irregular and without sanction of the trial Court. (Tr. 615) These phone calls constituted a serious violation of his duties as a juror.

CONCLUSION.

In conclusion, Appellant contends that, in view of the foregoing authorities and arguments, the trial judge of the U. S. District Court for the District of Hawaii erred, to the prejudice of the Appellant in convicting Appellant of the offense of knowingly, wilfully, unlawfully and feloniously purchasing eight (8) capsules of heroin and grains of cocaine, said heroin and cocaine not then and there being in the original stamped package or from the original stamped package, in violation of Section 2553(a), Title 26, U. S. Code, as charged; that the trial judge erred in denying the Appellant's Motion for the Suppression of Evidence, Motion for a Mistrial, Motion for Acquittal, and Alternative Motion for a New Trial.

Therefore, it is respectfully submitted that the judgment of the said trial judge should be reversed and a new trial granted.

Dated, Honolulu, T.H.,
August 2, 1950.

FONG, MIHO AND CHOY,
Attorneys for Appellant.